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This Opinion is Not
Citable as Precedent
of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ambu Inc.

Serial No. 76131965

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for Ambu Inc.

Leigh Caroline Case, Trademark Examining Attorney, Law
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Before Quinn, Chapman and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Ambu Inc. has applied to register RES-CUE PUMP as a
mark on the Principal Register for goods identified as
"medical apparatus, namely portable resuscitation pump," in
International Class 10. During prosecution of the
application, applicant complied with the examining
attorney's requirement that applicant enter a disclaimer of
exclusive rights in the word "pump."

In the first office action, the examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on the prior registration of RES-Q-VAC for "aspiration pump, hospital infant delivery room neonatal suction pump, endotracheal adapter, adult suction pump and yankauer," in International Class 10 (Registration No. 1762635); and also based on the prior registration of RES-Q-FLO for "mouth to mask manual resuscitators to administer mouth to mouth resuscitation without mouth to mouth contact," in International Class 10 (Registration No. 1345903). In the same action, the examining attorney provided applicant with information regarding four pending applications, noting that each of them might later be the basis for additional refusals under Section 2(d). Only one of the referenced applications resulted in a refusal that is involved in this appeal, as discussed infra.

Applicant responded to the initial office action by arguing against the issued refusals based on Registration Nos. 1762635 and 1345903, as well as against any prospective refusals based on the four applications. The examining attorney, in her second office action, specifically noted that the refusals based on the two cited registrations were "continued" but otherwise suspended

further examination of applicant's application, pending resolution of the status of the four applications which could have resulted in additional refusals.

Subsequently, two of the four applications referenced by the examining attorney became abandoned; but the other two resulted in the issuance of registrations. The examining attorney then issued an office action that refused registration of applicant's mark, under Section 2(d), based on the two newly issued registrations. This action did not "continue" or otherwise mention the previously issued refusals based on Registration Nos. 1762635 and 1345903.

Applicant responded to the new refusals, arguing against each of them. The examining attorney then issued a "final action" refusing registration of applicant's mark because of Registration No. 2643815, for the mark RESQ-PUMP for "medical device, namely suction pump for cardiac compression and decompression for use in CPR," in International Class 10. However, the refusal on the other more recently issued registration was expressly withdrawn. In this final action, the examining attorney did not discuss the original two refusals set forth in the initial office action. Accordingly, we consider the examining

attorney to have effectively withdrawn these original refusals.

Applicant filed a notice of appeal but specifically stated that it did not request an oral hearing. Applicant and the examining attorney have each filed a brief.

We analyze the issue of likelihood of confusion using the factors that were articulated by a predecessor of our primary reviewing court, the Court of Customs and Patent Appeals, in the case of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks").

In this case, we compare applicant's mark RES-CUE PUMP and the RESQ-PUMP mark in the cited registration by considering similarity, or differences, in the appearance, sound, connotations and overall commercial impressions of

the marks. Giant Food, Inc. v. Nation's Foodservice, Inc., 218 USPQ 390, 395 (Fed. Cir. 1983). We note, however, that when a common word used in two marks is generic, the focus of our inquiry centers on the similarity or differences of the non-generic portion. See In re Dixie Restaurants Inc., 41 USPQ2d 1531 (Fed. Cir. 1997). In this case, both marks are used on or in connection with pumps, so the common term "pump" is a generic term with regard to its identified goods and the goods listed in the cited registration. Moreover, in both marks the term "pump" comes last and would be perceived as a noun identifying the general nature of the goods, with the respective preceding terms being used as adjectives and serving to modify the noun "pump." Accordingly, the generic nature of the term "pump" and the structure of the two marks combine to prompt purchasers of the involved products to focus on the initial terms.

The initial term in applicant's mark is RES-CUE, while the initial term in the mark in the cited registration is RESQ. Applicant contends that these terms are "visually distinctive" because of the different spellings. Applicant, however, essentially admits that the terms sound the same and have the same connotation, when it argues in its brief "that the sound created by both marks, 'rescue,'

is a common sound in the names of CPR and other medical devices."¹

Given that the only differences in the marks are the slight visual differences attributable to positioning of the respective hyphens and registrant's use of Q instead of the letters CUE to complete the word "rescue," we find that the marks not only sound the same and have the same connotation, but also yield very similar overall commercial impressions.

Applicant argues, notwithstanding the great similarity of the marks, that there is no likelihood of confusion, because applicant assertedly uses its name Ambu in conjunction with its mark RES-CUE PUMP, while the registrant assertedly uses the name CPRx in conjunction with its mark RESQ-PUMP. In addition, applicant argues that USPTO records show at least seven marks that employ the term "rescue" or "resq" in some way for "a CPR or medical product," so that registrant's mark "is weakened by the logical correlation between the mark and [registrant's CPR] product." Applicant also argues that the similarity in the sound of the respective marks is not as significant as their visual differences, because applicant's product

¹ Applicant does not argue that the terms have different connotations.

typically is not ordered by phone or advertised in a medium such as radio. Instead, applicant explains, it is critical to use pictures and detailed descriptions of its products to promote sales and it therefore concentrates its marketing efforts almost exclusively on catalogs and the Internet. Finally, while applicant admits the possibility that its goods and those of registrant might be distributed in the same channels of trade, it argues that the prospective purchasers would be discriminating, the goods would not be bought on impulse, and the goods serve completely different purposes. Applicant therefore concludes that there is no likelihood of confusion and, to underscore its conclusion, it notes that the respective products have been sold concurrently for four years, but applicant is not aware of any actual confusion.

We cannot accord any weight to applicant's contention that it and the owner of the cited registration routinely utilize trade names or house marks with their product marks, as registrant's name or house mark is not part of its registered mark and applicant's applied-for mark does not include applicant's name or house mark. See Frances Denney v. Elizabeth Arden Sales Corp., 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959); and Blue Cross and Blue Shield

Association v. Harvard Community Health Plan Inc., 17

USPQ2d 1075, 1077 (TTAB 1990).²

We also cannot credit applicant's argument in its brief that the asserted existence of seven registrations for other marks including the term "'rescue,' spelled as 'rescue,' or 'resq,'" for CPR or medical products means that we should accord the cited registration a narrow scope of protection. Applicant did not introduce this evidence in any form during examination and it cannot be introduced during the pendency of an appeal, see Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Moreover, applicant did not, in any event, even attempt to properly introduce the asserted registrations. The marks are not listed in any way in the brief and copies of the registrations are not attached to the brief.³ Even if applicant had properly introduced this evidence, we must note that even a mark in a registration entitled to only a narrow scope of protection is still entitled to protection from

² We disagree with the examining attorney's contention that, in this case, the addition of house marks would add to rather than diminish the likelihood of confusion. However, the fact remains that the respective house marks or trade names are not part of the involved marks and cannot be considered.

³ It is not surprising, then, that the examining attorney's discussion in her brief of applicant's argument is set forth only as a general statement that third-party registrations tend not to be very probative evidence, for various reasons.

registration of a mark so similar that it is likely to cause confusion. See, e.g., In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover).

As for applicant's argument that the identical sound of the respective marks is less significant in this case, this argument is rooted in applicant's contention that the involved products are ordered almost exclusively through particular channels of trade. We note, however, that neither identification is restricted as to channels of trade and we must assume that the goods can be marketed in and move through all possible channels of trade typical for these products. See Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). Moreover, even apart from the similarity in sound of the marks, they have

the same connotation and same overall commercial impressions and the visual differences might not be recalled by consumers who did not encounter the marks side by side. For this same reason, while we presume that purchasers of these products would be somewhat discriminating, we cannot presume that they are experts in distinguishing trademarks based only on specific visual differences, or that they even would have the opportunity to compare the marks for such differences.

Finally, we do not accord significant weight to applicant's contention that there have been no instances of actual confusion despite an asserted four years of concurrent use of the respective marks. First, we have not had the opportunity to hear from registrant as to its awareness of any instances of confusion. Second, it has often been noted that evidence of actual confusion is difficult to obtain and therefore, while its existence may be strong evidence of a likelihood of confusion, its absence is not typically strong evidence that there exists no likelihood of confusion. Third, applicant contends in its brief, in its explanation of the significance of certain materials attached thereto, that applicant understands that "registrant's product has not been approved for use by the FDA." If applicant were correct,

then this circumstance would have acted to limit possible opportunities for actual confusion to occur.

The only remaining issue we need to address in some detail is the relatedness of the goods. Goods need not be competitive for a likelihood of confusion to exist. There only need be circumstances present that show likelihood that consumers would be exposed to both marks and might conclude that there was some relationship between the products, or common source or sponsorship, given the marks used on or in connection with the respective products. See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

The examining attorney argues in her brief that both applicant's and registrant's products are "pumps used in resuscitation" and "aid patients who cannot breathe" by "restoring the function of the lungs." This explanation of the relatedness of the goods is a bit broad, but so is the term "resuscitate," which means, "to restore consciousness, vigor, or life to."⁴ However, as previously noted, we must

⁴ We take judicial notice of this definition. See The American Heritage Dictionary of the English Language 1109 (New College ed. 1976). We also take judicial notice that CPR stands for "cardiopulmonary resuscitation." See The Random House College Dictionary 311 (rev. ed. 1981).

assess likelihood of confusion based on the identifications set forth in the involved application and registration. Applicant's identification is much broader than that of the cited registration, and must be read as encompassing a wide variety of "resuscitation pumps," including a pump used to perform CPR.

With its brief, applicant submitted evidence intended to demonstrate that its goods and those of registrant are very different in type. The evidence was not timely submitted, see Trademark Rule 2.142(d), and cannot be considered. Moreover, even if it were considered, we would conclude that it shows the goods to be different but complementary items that any rescue squad or ambulance personnel might employ. Under these circumstances, we find the goods to be related.

Given the great similarity of the marks in sound, connotation and overall commercial impression, the relatedness of the goods, and the presumptive marketing in overlapping channels of trade to the same classes of consumers, we conclude that a likelihood of confusion exists.

If evidence regarding the differences in the precise nature of the goods had been properly made of record, this circumstance and the presumptive discriminating nature of

Ser No. 76131965

the purchasers might raise doubt about our conclusion that confusion is likely. Even then, however, we would be required to resolve this doubt in favor of registrant. See Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992).

Decision: The refusal of registration under Section 2(d) of the Trademark Act is affirmed.